

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5841 of 1985
with
SPECIAL CIVIL APPLICATION No 5698 of 1985
with
FIRST APPEAL NO. 1364 OF 1985

Date of decision: 16-1-1997

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

P B TEXTILES PVT LTD

Versus

GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION

Appearance:

1. Special Civil Application No. 5841 of 1985
MS VASUBEN P SHAH for Petitioner
MR DU SHAH for Respondent No. 1
2. Special Civil Application No 5698 of 1985
MR D. U. Shah for Petitioner

3. First Appeal No.1364 of 1985

Mr. D. U. Shah for the appellant

Ms. V.P.Shah for the respondent.

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 16/01/1997

C.A.V. JUDGEMENT

As the parties to these three matters are common and the matters arise from the dispute regarding same plot, and proceed on the same facts and grounds, they are being disposed of by this common judgment.

2. The disputed plot is Plot No.150 admeasuring 3875 sq.mts. situate in G.I.D.C.Estate, Ankleshwar. This plot was originally granted by Gujarat Industrial Development Corporation (GIDC) to M/s.Eslon Synthetics Industries ('Eslon" for short) on 99 years lease as per lease deed dated 29th January, 1976. Eslon raised various loans from Bank of Baroda and as security thereof they created mortgage by deposit of title deeds of Plot No.150 along with the superstructure erected thereon with the Bank. Eslon failed to pay the dues of the Bank of Baroda in the sum of Rs.21,89,493.59 ps. Bank of Baroda ('BOB') filed Special Civil Suit No.5/79 in the Court of Civil Judge (S./D.), Bharuch for recovery of the said dues and for declaration that the properties mentioned in Schedule I and II attached to the plaint were mortgaged with the Bank and for sale of the said property by public auction or private deal as the Court may deem fit. The aforesaid suit was decreed by the Court. The Bank has put the decree in execution by filing Special Darkhast No.55 of 1982. The petitioner's predecessor in title M/s.P.B. Textile Works, a registered partnership firm (now converted into M/s. P. B. Textiles Pvt. Ltd.,) has purchased the immovable property comprising of Plot No.150 with the superstructure of the factory building thereon and electrical and other fixtures, in the court auction sale. Sale certificate was issued by the learned Civil Judge (S.D.), Bharuch, to the petitioner on 22nd July, 1983. After purchase of plot No.150 the petitioner, vide letter dated 7-4-1984, called upon respondent G.I.D.C. to transfer the plot in the name of the petitioner and to provide the petitioner with all the amenities and facilities such as water supply, electricity, etc., G.I.D.C., by its letter dated 11-4-1984, informed the petitioner that the matter was referred to its Head Office and decision as taken by the

Head Office will be implemented on receipt of the same.

3. At this stage the petitioner approached the Civil Court in the execution proceedings by filing application being Misc. Civil Application No.10 of 1984 in which G.I.D.C. was impleaded as party, and prayer was made to issue directions to G.I.D.C. to transfer the said plot purchased by the petitioner in court auction from the name of judgment debtor to the name of the petitioner and for further direction to G.I.D.C. to provide all consequential facilities to the petitioner as an allottee. This application came to be decided by the Civil Judge (S.D.), Bharuch under order dated 4-9-1984 and the aforesaid prayer made by the petitioner was granted.

4. G.I.D.C., instead of carrying out the aforesaid order of the Civil Judge (S.D.), Bharuch, challenged the same before this Court by filing appeal, being First Appeal No.1364 of 1984. The first appeal was admitted on 14-10-1985. G.I.D.C. also filed special civil application No. 5698 of 1985 challenging therein the order dated 4-9-1984 made by the Civil Judge (S.D.), Bharuch on the application of the petitioner. Further challenge has been made in the said special civil application to the letter of the Civil Court dated 21-9-1984 under which the order dated 4-9-1984 was directed to be complied with. Special civil application No. 5698 of 1985 is nothing but a parallel remedy which has been taken by G.I.D.C. against the same order of the Civil Judge (S.D.), Bharuch, which has been challenged by filing First Appeal No.1364 of 1985.

5. The petitioner filed special civil application No. 5841 of 1981 before this Court and prayer has been made for direction to the respondent G.I.D.C. to recognise the petitioner as holder of plot No.150 in place of M/s. Eslon Synthetics Industries and consequently to transfer the same in the name of the petitioner without any condition whatsoever and for further direction to the respondent to provide all amenities and common facilities as available to other holders of plots in G.I.D.C. Estate at Ankleshwar where the said plot is situated. This special civil application was admitted on 29th October, 1985 and was directed to be heard along with special civil application No.5698 of 1985 which was admitted by this Court on 18th October, 1985.

6. In the letter dated 11-4-1984 G.I.D.C. has stated that as per the policy of the Corporation unless

all the dues are cleared and unearned increment is paid the Corporation is not in a position to release the water connection.

7. Ms. Vasuben P. Shah, learned counsel for the petitioner contended that the demand of the Corporation of all dues of the predecessor and unearned increment as a condition for recognizing the petitioner as a leaseholder of plot No.150 as well as for release of other amenities is wholly arbitrary and unjustified. The counsel for the petitioner further contended that the petitioner has purchased the plot in question in court auction and on the date of auction the petitioner paid the market price of the plot, and as such there is not question of any demand of unearned increment. Demand of unearned increment would have arisen only where there is voluntary transfer of the plot by the original lessee which is not the case here. Lastly the learned counsel for the petitioner contended that as per the lease, liability to pay unearned increment is of the original lessee and not of the petitioner.

8. The counsel for the respondent fairly conceded that all dues of the predecessor are not recoverable from the petitioner as the petitioner Company has purchased the plot in question in court auction. However, the counsel for the Corporation contended that as the petitioner is claiming transfer of leasehold rights in its favour, the unearned increment has to be paid by it. Unless that amount is paid by the petitioner the Corporation is not under obligation, much less legal obligation, to transfer the plot and to provide any amenities to the petitioner.

9. Mr. D.U. Shah, learned counsel, in support of the petition filed and the First Appeal filed by the Corporation contended that the order of the Civil Judge (S.D.), Bharuch on the application to direct the Corporation to provide the petitioner the common amenities without any condition whatsoever is without jurisdiction. Once the suit has been decreed and the execution proceedings have come to an end by issue of sale certificate the court becomes functus officio and no such order could have been made. On the other hand learned counsel for the respondent Company firstly raised preliminary objection regarding maintainability of the special civil application filed by G.I.D.C. Her contention is that the petitioner Corporation could not have filed two parallel remedies at the same time before this Court. When the Corporation filed appeal, then it is not permissible to it to challenge the very order of

the civil court by filing special civil application as well. On merits the counsel for the respondent Company contended that the Company has purchased the plot in public auction. In case of any difficulty created by the Corporation in the way of the Company to utilise the plot, the Company was within its rights to approach the court concerned and the Court was within its jurisdiction to pass order protecting the right of the auction purchaser.

10. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. I consider it proper first to deal with the preliminary objection which has been raised by the learned counsel for the Company. The challenge in the first appeal is made by the Corporation to the order of the Civil Court dated 4-9-1984. In the special civil application No.5698 of 1985 the Corporation made challenge to the very same order. So the Corporation has simultaneously availed of two remedies before this Court - one by way of filing first appeal and the other by way of filing writ petition under Article 227 of the Constitution of India. The counsel for the Corporation contended that in the special civil application the Corporation has challenged the jurisdiction of the Civil Court to pass order. I hardly find any justification in this contention. In the first appeal the Corporation could have raised, and it is permissible to raise, the question of jurisdiction of the Civil Court to pass order impugned in the appeal as well as the special civil application. Learned counsel for the Corporation has failed to point out how jurisdictional point was not permissible to be raised in the first appeal. The Corporation has the right to raise all the grounds of challenge to the validity, legality and correctness of the order of the civil court in the first appeal filed before this Court, including the ground of jurisdiction. I do not find any justification in the action of the respondent Corporation to file special civil application No. 5698 of 1985. It is ill advise and a sheer wastage of money of the Corporation in unwarranted litigation. The Corporation's money, which is public money, has been waisted in a litigation for which there is no factual or legal justification. When the Corporation had already challenged the order of the Civil Court by filing first appeal before this Court, and that first appeal was admitted on 14th October, 1985, i.e. earlier to the filing of special civil application No.5698 of 1985, filing of the writ petition under Article 227 of the Constitution of India is wholly unjustified. It is true that the appeal filed by the Corporation was delayed by 303 days, but prior to the

filing of the special civil application the delay was condoned and the appeal was admitted. There are catena of decisions of the Hon'ble Supreme Court as well as other High Courts on the point that the parties cannot avail simultaneously parallel remedies. Reference in this respect may be made to the decisions of the Hon'ble Supreme Court in the case of Jai Singh vs. Union of India reported in AIR 1977 SC 898 and in the case of Awadh Bihari Yadav vs. State of Bihar, reported in AIR 1996 SC 122 and the decision of the Madras High Court in the case of Chemech Engineers Pvt. Ltd., vs. Director of Industries and Commerce, reported in AIR 1994 (Madras) pg. 14.

11. There is yet another reason for which special civil application No.5698 of 1985 cannot be entertained by this Court. This Court will not permit its extraordinary jurisdiction to be converted into civil Court under the ordinary law. It is a case where order has been passed by the Civil Court in execution proceedings. Against that order remedy has been provided under the Code of Civil Procedure, 1908 and in fact the petitioner Corporation has availed of that remedy by filing first appeal before this court. Challenge by the Corporation to the order of the Civil Court by writ petition is not permissible under Article 227 of the Constitution of India. In the case of Swetambar Sthanakwasi Jain Samiti vs. The Alleged Committee of Management Sri R.J.I.College, Agra, reported in JT 1996 (3) SC 21 and Durga Prasad vs. Naveen Chandra, reported in 1996 JT SC 564 the Hon'ble Supreme Court held that when suit is pending, miscellaneous orders passed by the trial court cannot be challenged by way of writ petition. Here is a case where executing court has passed order against which remedy is provided in the C.P.Code itself. On this ground also special civil application No.5698 of 1985 is not maintainable.

12. Now I may consider special civil application No.5841 of 1985. To appreciate the points raised in the special civil application I consider it proper to extract the relevant clause of lease deed which reads as under:

"Clause 2(s): Assignment to be registered with Lessor and unearned increment. -- In the event of such transfer, assignment, under letting or parting with, there shall be delivered by the Lessee at his expense a notice thereof to the Chief Executive Officer or such Officer of the Lessor as the Lessor may direct within twenty days from the date on which the transfer,

assignment, underletting or parting with becomes effective whether by registration thereof under the Indian Registration Act or otherwise, provided that in the event of such transfer assignment underletting or parting with fifty per cent of the unearned increment that may be accrued to the lessee shall be paid by the Lessee to Chief Executive officer of the Lessor, provided further that the unearned increment shall be valued by the Chief Accounts Officer of the Lessor and the decision of the Chief Accounts Officer will be binding on the Lessee."

Clause 2 (r) of the Lease Deed provides that the lessee will not transfer, assign or underlet or part with possession of the demised premises or any part thereof or any interest therein without the previous permission of the Lessor. Clause 2 (s) provides that in the event of such transfer, assignment, underletting or parting with possession, 50% of the unearned increment that may be accrued to the lessee shall be paid by the lessee to the Chief Executive Officer of the Lessor. It is further provided in the said clause that the unearned increment shall be valued by the Chief Accounts Officer of the Lessor and such decision of the Chief Accounts Officer will be binding on the lessee. The qualifying words in clause 2(s) "such transfer" refers to the transfer mentioned in clause 2 (r) of the lease deed. I find sufficient merits in the contention of the learned counsel for the petitioner that clause 2(s) is operative and applicable only where voluntarily transfer has been made by the lessee under clause 2(r) of the lease deed., and not to the transfer of lease hold right under the auction by Court for default in payment of the loan etc., There is certainly distinction between 'transfer under clause 2 (r)' and 'transfer of the demised premises of the lessee under a decree of the court' in favour of Bank or financial institution, wherefrom the lessee had raised loan and the title deeds of the property have been deposited with the Bank or financial institution creating equitable mortgage as collateral security for the repayment of the loan. Unearned increment is considered to be a profit of the lessee. Naturally while passing of time value of the land would increase and the Corporation had reserved its right to share that profit with the lessee in the form of increase of cost, where later proposes to transfer his/its lease hold rights in the demised premises.

13. Profit can only be there to the lessee where he transfers, assign, underlet or part with possession of

the property in a voluntary transaction. But in the case of sale of the demised premises in execution of a decree passed against the lessee for default in payment of loan amount, by public auction, clause 2(r) and clause 2(s) are not applicable. In such cases the prior permission for transfer, assignment, underletting or parting with possession of the demised premises from the Corporation is not required. So the demand of the Corporation from the petitioner for unearned increment is wholly unjust. The Corporation has failed to make out any case for the same either under the lease covenants or under any rules or regulations.

14. The matter needs to be considered from a different approach also. The unearned increment is the profit and it means the difference in the price of the land on the date of allotment to the lessee and the date of transfer by the lessee. This profit has to be calculated on the basis of the prevailing market price of the land on the date of transfer thereof by the lessee. Auction is one of the mode of transfer, assignment, underletting or parting with possession of the demised premises. Auction is also considered to be one of the best modes of getting maximum market price of the demised premises. So the price which has been there of the demised premises in the public auction is the market price. The petitioner has paid the market price in public auction. If the petitioner is compelled to pay the unearned increment, then the market price of the land would be more than what the petitioner has to pay. The petitioner has purchased the property in public auction and he has to pay only the price for which he has offered his bid. If some thing more than the bid amount is directed to be paid by him, then it will be the additional burden for which he was not under any legal obligation to pay.

15. Auction is conducted subject to the terms and conditions as laid down by the Court. It is not the case of the Corporation that one of the terms of the auction was that the petitioner has to pay to the Corporation the unearned increment. In case the petitioner had purchased the demised premises subject to the aforesaid condition, then there may be justification in the demand of the Corporation for unearned increment. But that is not the case here. So taking the matter from any angle, I fail to see any justification or legal sanction in the action of the Corporation to demand unearned increment from the petitioner.

16. Clauses (r) and (s) have to be read together. It

is the obligation of the lessee to pay to the Corporation the unearned increment out of the profit from voluntary transfer, assignment, underletting of parting with possession. Transfer by the lessee could have been only with the previous permission of the lessor Corporation and as such this condition is a charge by way of transfer fee on the lessee. There is substance in the contention of the learned counsel for the petitioner that the demand could have been made only from the lessee and not from the purchaser. The purchaser is not a person who gains, but the lessee is the person who gains and the person who gains has to share the profit with the Corporation.

17. In the result special civil application No.5841 of 1985 succeeds and the same is allowed. The Corporation is directed to recognise the petitioner as holder of Plot No.150 in place of M/s.Elson Synthetics Industries and transfer the same in the name of the petitioner without any condition whatsoever and to provide all amenities and common facilities to the petitioner as available to other holders of plot in G.I.D.C. Estate at Ankleshwar where the aforesaid plot is situate. It is a case where the petitioner has been unnecessarily harassed without any justification whatsoever. The petitioner Corporation is directed to pay Rs.2,000/- (Rupees two thousand) by way of cost of this petition to the petitioner. The counsel for the petitioner submits that in case the amount of cost is ordered to be deposited by this Court in the Advocates' Welfare Fund, she has no objection. Order accordingly. The Corporation is directed to deposit Rs.2,000/- towards cost of this petition in the Office of the Bar Council of Gujarat in the account of Advocates' Welfare Fund within two months from the date of receipt of certified copy of this judgment, and the receipt thereof shall be produced on record of this petition. Rule made absolute accordingly.

Special civil application No.5698 of 1985 is dismissed with cost of Rs.2,000/-. The counsel for the respondent Company has no objection in case the amount of cost is ordered to be deposited by this Court in the Advocates' Welfare Fund. Order accordingly. The petitioner Corporation is directed to deposit Rs.2,000/(Two thousand only) by way of cost of respondent in the office of the Bar Council of Gujarat in the account of Advocates' Welfare Fund within two months from the date of receipt of certified copy of this judgment and the receipt thereof shall be produced on record of the petition. Rule discharged.

In view of acceptance of special civil application No.5841 of 1985 and dismissal of special civil application No.5698 of 1985, First Appeal No.1364 of 1985 becomes infructuous and the same is dismissed, with no order as to costs.

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